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IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1085~~ 119

SAMUEL ROTH,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel Roth, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Southern District of New York, which denied petitioner's motion (made pursuant to Rule 35 of the Federal Rules of Criminal Procedure) for reduction of a five year and $5,000 fine sentence for violation of the obscenity law to time served and fine paid, the Court of Appeals holding that unconstitutional standards may be used, and that changed circumstances need not be considered, in denying relief under Rule 35 so long as some data which may legitimately be considered is before the sentencing court.

Opinion Below

The opinion below is not yet reported. It is appended hereto as Appendix A. The oral opinions of the District Court upon sentencing and upon the Rule 35 motion are annexed hereto as Appendix B and Appendix C respectively.

Jurisdiction

The judgment sought to be reviewed was made and entered on May 22, 1958, the Court of Appeals having affirmed the District Court in its May 22, 1958 opinion annexed hereto. No motion was made respecting a rehearing. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U. S. C. § 1254 (1).

Questions Presented for Review

1. Whether a District Court may impose and refuse to modify a maximum (or severe) sentence upon an obscenity conviction (18 U. S. C. § 1461) for mailing the type of material which is concededly least offensive, when such sentence rests wholly (or primarily) upon a record of convictions for obscenity, all in the remote past and unrelated to present moral character, which said past convictions were illegal and in violation of the First, Fifth (due process) and Fourteenth (due process) Amendments to the United States Constitution, when the sentencing court has before it such facts, solely because the sentencing court had before it a presentence investigation report which included a record of acquittals as well and a self-serving declaration of the defendant, and has before it (on motion to modify sentence) a variety of additional data, consisting of (a) an incorrect representation to the Court by the Assistant United States Attorney that six members of this Court and all members of the Court of Appeals had found the material upon which the conviction was based to be

pornographic; (b) a statement by the United States Attorney complaining that petitioner had continued to mail material which had been found not obscene in the instant case; (c) a glowing report on petitioner's domestic life from a most prominent clergyman; (d) proof that petitioner's age and precarious physician condition made his sentence equivalent to one of death; (e) information that the usual sentence in obscenity cases is a small fine; (f) proof that petitioner had been entirely rehabilitated and would no longer engage in any business except as a writer and poet, thus also foreclosing possibility of repetition of the offense.

2. Whether a court may refuse to modify a maximum (or severe) sentence, tremendously at variance with the usual sentence, imposed for a minimal offense solely (or primarily) because of a record of obscenity convictions in the remote past, unrelated to present moral character, when other new material favorable to the prisoner is then placed before it.

3. Whether the imposition of a sentence and the refusal to modify it as set forth above in Questions 1 and/or 2 above is consistent with the freedom of the press and speech protected by the First and Fourteenth Amendments to the United States Constitution, and with the due process of law and double jeopardy clauses of the Fifth Amendment to the United States Constitution.

4. Whether, in refusing to modify a sentence on a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, a court may fail to take into account all the changed facts and circumstances as they existed on the return day of the motion.

5. Whether the Court of Appeals, in affirming the District Court's refusal to modify sentence in the light of the facts recited in Questions (1) and/or (2) above, and in the light of the District Court's failure to take into account

all the changed facts and circumstances as they existed on the return day of the motion, so far sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

6. Whether the Court of Appeals erroneously failed to review the decision on the Rule 35 motion to determine whether there had been an abuse of discretion.

Constitutional Provisions and Rule Involved

Amendment I, United States Constitution: "Congress shall make no law * * * abridging the freedom of speech, or of the press. * * *."

Amendment V, United States Constitution: "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law * * *."

Amendment XIV, United States Constitution, Section 1, Clause 2: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

Federal Rules of Criminal Procedure, Rule 35: "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

62 Stat. 768, 18 U. S. C. § 1461 (set forth in Appendix D hereto). (It is involved only tangentially.)

Statement of the Case

This is a petition for certiorari to review the judgment of the Court of Appeals below affirming the denial (App. 2a, 31a)[1] of a motion (App. 9a-17a) pursuant to Rule 35 of the Rules of Criminal Procedure for reduction to time served (then eight months) of a five year and $5,000 fine sentence for violation of the federal obscenity law (18 U. S. C. § 1461). The order of this Court affirming petitioner's conviction was received by the district court on Oct. 21, 1957; the Rule 35 motion was filed on Oct. 29, 1957, and was heard and determined on Nov. 27, 1957. The court of first instance thus had jurisdiction (Rule 35).

History of case. Mr. Roth, petitioner here, was convicted in 1955 in the District Court for the Southern District of New York on four counts of a twenty-six count indictment—one of the four counts being for the mailing of *American Aphrodite,* Vol. 1, No. 3, and the other three such counts for the mailing of circulars advertising this book. He was sentenced to five years imprisonment on each such count, the terms to run concurrently, and fined $5,000, the lengthy sentence being imposed solely because defendant had a record of several convictions on supposedly obscene literature (App. 8a). The Court of Appeals affirmed, 237 F. 2d 796. This Court granted certiorari (352 U. S. 964), and affirmed by a divided Court (6-3), 354 U. S. 476. No question of the severity of sentence or of the obscenity of the material was raised in either Court (App. 30a). Upon remand, the Rule 35 motion was timely made, and was referred to the Honorable John M. Cashin, the sentencing judge, who heard the motion on November 27, 1957 (App. 18a-31a). He denied the motion, ruling: "I feel that my sentence, in view of this man's record at the time I imposed it, was fair and just" (App. 31a). The Court of Appeals affirmed, ruling that the District Judge also had before him other data including a "brochure" submitted by the

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[1] Such references are to the Appendix printed originally for the use of the Court below.

petitioner himself, the probation report, and information as to petitioner's health and domestic life. However, none of this other data was even mentioned or relied upon by the trial court in imposing sentence or in the decision on the Rule 35 motion.

The Appellant's Prior "Record". Since the original sentence was predicated solely upon defendant's past convictions (App. 8a), and since the refusal to modify the sentence was based solely on that consideration (App. 31a), we set forth here the record of convictions, in terms of the literature involved, the courts and the dates of prior convictions.

1. The first conviction was in 1928 [2] in a federal court (U. S. D. C., S. D. N. Y.) for mailing Sir Richard Burton's translation of *The Perfumed Garden,* a classic fourteenth century Arabic work (App. 13a) regarded as a sacred book in the Moslem world. It is and has been freely available in the New York Public Library's Oriental collection. Mr. Roth was fined $500, and execution of a six months term was suspended.

2. His second conviction, after an arrest by John Sumner, was also in 1928, in New York City's Court of Special Sessions, for possessing and selling two stories from Boccaccio's Decameron that can now be obtained at the New York Public Library and purchased in any book store (*ibid*). [The works of Boccaccio had been judicially cleared in New York thirty-two years previously. *In re Worthington Co.*, 30 N. Y. Supp. 361 (Sup. Ct.) (not officially reported).] Appellant was sentenced to serve three months.

(2a. This resulted in 1930 in a four months sentence for violation of probation on the first conviction.)

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[2] The dates and places of conviction are abstracted from an affidavit sworn to by William C. O'Brien, Assistant Solicitor for the Post Office, on April 6, 1956, in *Seven Sirens Press* v. *Schaffer*, Civ. Act. 108.222, U. S. D. C., S. D. N. Y. (This affidavit incorrectly lists a conviction in that Court in 1941; there is no record of such.)

3. Petitioner's third conviction was in a state court in Philadelphia later in 1930, for sale and possession of *Ulysses* by James Joyce (App. 13a), serving three months. Three years later, Judge Woolsey held the same book not obscene, and his monumental decision was affirmed by the Court below. *United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182, aff'd 72 F. 2d 705 (C. A. 2, 1934) (App. 13a).

4. Petitioner's fourth conviction was in 1934 in New York City's Court of Special Sessions, for publishing *American Anecdotes*, which is now freely available to the public (App. 13a). Petitioner was sentenced to twenty days or $100 fine; the fine was paid.

5. In 1936, petitioner's fifth conviction occurred, in the Southern District of New York, for mailing *The Ananga Ranga*, a famous Hindu classic dealing with the art of love in the style of Ovid (App. 13a), and *Lady Chatterley's Lover* (App. 4a). He received a three year sentence. (Though it does not appear in the record, a prosecution in New York City in 1931 against appellant for selling *Lady Chatterley's Lover* had been dropped.)

One of the convictions above was also for the English version of *Reigen*, a movie from which, under the title *La Ronde*, was permitted circulation by this Court in *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (App. 13a).

There were no convictions after 1936 until the 1955 conviction at bar for *American Aphrodite*. The story therein, parts of which caused the book's condemnation (*Venus and Tannhauser* by Aubrey Beardsley), had been published by petitioner in 1926 and had been sent by him through the mails without even Post Office protest, and has never formed the basis for prosecution—except in this case—in any of the many countries where it was published.

In all other battles with the law, acquittals were obtained. In 1931, after another arrest by John Sumner,

Mr. Roth was acquitted re his publication of *Celestine*, the English version of *The Diary of a Chambermaid* by Octave Mirabeau, which the New York Public Library now has available on its bookshelves (App. 13a), and which is freely available in paper-back editions. A charge involving his publication of Benjamin Franklin's essay *To A Young Man on How to Choose a Mistress* was dismissed (*ibid.*). In 1951, the defendant was acquitted in the Southern District of New York for publishing another book. He was prosecuted for this same book again a few years later, this time in a New York City court, in the course of which a writ was placed on his premises and his machinery and mailing lists were taken away, plus 70,000 volumes (App. 5a); the search warrants were later vacated (*People* v. *Roth*, 207 Misc. 875, 144 N. Y. S. 2d 122), and the charges dismissed.

Other Facts Advanced by Petitioner at Sentencing, but Not Considered. (a) Petitioner would get out of the mail order business, and instead would merchandise razor blades, publish religious classics, and reorganize a school for instruction in English (App. 6a-7a). (b) Petitioner was 62 years of age (App. 5a), suffering from diabetes and a kidney disorder (App. 6a). (c) Petitioner's wife would be alone; petitioner has children and grandchildren. (d) In a pre-sentence memorandum to the court (App. 8a), the so-called "brochure", petitioner wrote that "Brooklyn Naval Intelligence reported that at the risk of my life, I had helped them trap a group of plotters whose presence was of great danger to the state." This group had planned to sabotage American industry when the United States entered World War II.

New Facts Advanced by Petitioner on Hearing of Rule 35 Motion, but Not Considered. (a) The Supreme Court had ruled that the case involved fundamental questions of constitutional law and three Justices thereof had dissented in petitioner's favor (App. 9a); Mr. Justice Harlan had stated the material involved to be not obscene within the meaning of the statute (App. 9a-10a). (b) The United

States had admitted in the Supreme Court that defendant's material was at worst borderline entertainment, the least offensive material, and was not hard core pornography (App. 12a, 14a, 19a); Mr. Justice Harlan agreed (App. 20a). (c) Petitioner was primarily an author and poet, who has written for newspapers and magazines of the highest repute, whose many books have been published by leading publishing houses, whose 1957 book received favorable comments and whose *The Life of Jesus Christ* is scheduled for publication in 1958 (App. 13a-14a). (d) Petitioner had abandoned his publishing venture and undertook never again to enter this line of business (App. 15a), and would engage in no business except as a writer and a poet (App. 19a). (e) Petitioner's statistical mortality was less than the remainder of his sentence; his then physical condition—diabetes, heart disease, and osteoarthritis—and age (63) made his sentence equivalent to one of death (App. 15a, 19a). (f) Petitioner's wife had a breakdown during his incarceration (App. 15a, 21a). (g) The time already served exceeded the average of sentences in obscenity cases (App. 15a), which is generally a small fine (App. 21a, 27a-28a). (Petitioner at this writing has served some eighteen (18) months.) (h) Petitioner had been married forty years (App. 22a). Rabbi de Sola Pool, dean of American Rabbis (App. 23a), testified as to petitioner's fine family, including two children and grandchildren and "this terrible blow" to the family from the sentence (App. 24a). (i) Petitioner offered letters from such outstanding persons as the editors of *Forbes Magazine* and *TV Guide* (App. 22a-23a), but these were not received (App. 31a).

Statements by the United States Attorney. He complained at the original sentencing because defendant continued to mail the material on which he was acquitted (App. 2a). On the Rule 35 motion, the United States Attorney incorrectly advised the court that the Court of Appeals and the six-man majority in this Court had found the material involved to be pornographic (App. 25a), and therefore argued that petitioner was not an imposed-upon author as he otherwise seemed to be (*ibid.*).

ARGUMENT

Introduction

The appealability of an order denying relief under Rule 35 was conceded by the United States Attorney on oral argument. The Court of Appeals below, like other Courts of Appeal, allowed and heard such an appeal without raising any question of appealability. See, *e.g.*, *Kramer* v. *United States*, 166 F. 2d 515 (C. A. 9, 1948); *Duggins* v. *United States*, 240 F. 2d 479 (C. A. 6, 1957).

POINT I

In ruling that the availability of legitimate material to the sentencing judge in a federal court permits him to use an unconstitutional standard in sentencing, when the U. S. Attorney had affirmatively misinformed the sentencing court as to the views of the appellate courts about the merits of the case, the court below decided a federal question in a way in conflict with applicable decisions of this Court, in conflict as well with the decision of another Court of Appeals on the same matter, and so far sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. This Court and another Court of Appeals have held that a sentence must, under such circumstances, be reversed.

1. In deciding that the presence of legitimate but unconsidered data *per se* legitimized complete or primary reliance upon assumedly unconstitutional standards, the Court below in effect ruled that unconstitutional standards may always be used as the sole or primary basis of sentencing—for the plain fact is that every sentencing judge has before him a presentence investigation report, which contains a variety of data including information as to a defendant's domestic life (see *Williams* v. *New York*, 337

U. S. 241, 246). The decision of the Court below conflicts with *Minoru Yasui* v. *United States,* 320 U. S. 115, which held that a sentence must be reversed and remanded merely because an incorrect finding of mixed law and fact had been made, a finding which the sentencing court itself thought irrelevant to the question of sentence [see same case on remand, *sub. nom. United States* v. *Minoru Yasui,* 51 F. Supp. 234, 235 (D. Ore. 1943)]. In that case, the offender had been convicted for violation of the curfew law. While holding that the curfew order applied equally to citizens and non-citizens, and that citizenship was therefore not relevant to the conviction itself, this unanimous Court said as follows:

> "But as the sentence of one year's imprisonment—the maximum permitted by the statute—was imposed after the finding that appellant was not a citizen, and as the Government states that it has not and does not now controvert his citizenship, the case is an appropriate one for resentence in the light of these circumstances. * * * The conviction will be sustained but the judgment will be vacated and the cause remanded to the district court for resentence * * * ." *Id.* at 117.

In the case at bar, the sentence here was imposed after the finding that petitioner had been convicted of five crimes, and the Government has at no point controverted our contention that these prior convictions were all illegal and unconstitutional. In the *Minoru Yasui* case, the sentencing court also doubtless had before it a presentence investigation report, containing a variety of data.[3]

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[3] The record is unavailable in New York City where this petition is being written, but such reports are and have been matters of routine. While probably there was no self-serving memorandum submitted to the court in *Minoru Yasui,* this memorandum here (termed a "brochure" by the sentencing judge), was merely a substitute for the statement a defendant may make before sentencing; indeed, the district judge foreclosed the making of such statement because of the submission of the "brochure" (App. 7a). The "brochure" contained the information that petitioner had helped break up a Nazi spy ring (see *supra,* p. 8). It was a self-serving declaration.

This Court has always taken the position that the possibility that a judgment may rest upon an unconstitutional basis necessitates its reversal. *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5; *Stromberg* v. *California*, 283 U. S. 359, 368; *Williams* v. *North Carolina*, 317 U. S. 287, 292. The mere fact that other legitimate data of the fullest sort is before the ruling tribunal has been held not to excuse the use of unconstitutional standards. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

This Court has gone so far as to reverse the sentence of a state court where, unlike the case at bar, the sentencing judge had not expressly rested his sentence upon an unconstitutional basis, but where such basis had merely been mentioned in a colloquy. Said this Court:

> "We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving." *Townsend* v. *Burke*, 334 U. S. 736, 740.

This Court then held that the mere *influencing* of a state court's sentence by erroneous facts about a person's past record was a violation of due process. Said this Court:

> "* * * this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law * * *.
>
> "* * * It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false * * *, that renders the proceedings lacking in due process." *Id.* at 741.

While this Court also relied on the lack of counsel who might have corrected the errors, the fact that counsel in the case at bar were unsuccessful in correcting the errors, in no way corrected the sentencing court's constitutional error. Moreover, the case at bar involves a *federal* conviction, and this Court has accordingly wider powers to

correct the sanction by the Court of Appeals of a judicial practice so substantially departing from the accepted and usual course.

In *Yates* v. *United States*, U. S. , 78 S. Ct. 766, 768, this Court reduced a sentence for contempt because it was "based on an extent of wrongdoing found unsustainable in law"—just as the sentence in the case at bar rests upon an extent of wrongdoing purportedly shown by prior convictions which is unsustainable in law because such convictions were unconstitutional. While it is true that in contempt cases sentences are reviewable because of the extraordinary power to sentence without limits (*Green* v. *United States*, 356 U. S. 165), the decision in *Yates* in no way whatsoever rested upon the fact that the sentence was for contempt. If a sentence is to be reversed because it rests upon an extent of wrongdoing found unsustainable in law, there is no reasonable basis for distinguishing between a contempt case and the usual criminal case—the lack of limits upon a sentence for contempt is simply irrelevant to the *ratio decedendi* of *Yates*. *Yates* held that an illegal sentence must be reduced; *a fortiori*, an unconstitutional sentence—the case at bar—must be reduced.

2. The presence of a variety of legitimate data does not permit a sentence to stand when the United States Attorney has made an incorrect representation to the sentencing judge. The only data unfavorable to the petitioner was his past record of unconstitutional convictions, together with the prosecution's incorrect representation that the six-man majority of this Court and all members of the Court of Appeals had found the material pornographic.[4] The sen-

[4] This Court specifically noted that the question of obscenity was not before it. 354 U. S. at 481, n. 8. While it is true that the Court of Appeals had commented in its opinion that "the record shows only saleable pornography" (237 F. 2d at 799), no question as to obscenity or non-obscenity of the materials was raised on the appeal, nor were the exhibits part of the record. Mr. Justice Frank, concurring, merely stated that "many of the publications mailed by defendant offend my personal taste" (*id.* at 804), but did not characterize the material as obscene.

tencing court expressly noted the affirmances of the conviction (App. 30a-31a).

But the Court of Appeals for the Fifth Circuit has held that when an agent of the United States informs a court before sentence that a defendant committed crimes of which he was innocent, due process is violated, though there is not even an indication that the misinformation played a part in sentencing. *Smith* v. *United States*, 223 F. 2d 750; accord, *Townsend* v. *Burke*, *supra*. Since the nature of the offense must be considered in imposing sentence [*Williams* v. *New York*, 337 U. S. 241, 248, fn. 10; cf. *Schware* v. *Board of Bar Examiners*, *supra*, 353 U. S. at 243], the furnishing of misinformation on the Rule 35 motion as to this Court's views on the nature of the offense furnishes a basis for reversal in and of itself. Though petitioner's counsel was present when the erroneous representation was made to the district judge, this does not excuse the error. *Berger* v. *United States*, 295 U. S. 78, 88.

B. The convictions upon which the district judge relied could not constitutionally be used as the basis for imposing the maximum sentence.

1. Our contention below that all of these past convictions were unconstitutional was denied neither by the United States nor by the Court of Appeals.[5] A sentence predicated upon such a record is inconsistent with this Court's decision in *Townsend* v. *Burke*, *supra*, invalidating a sentence when the defendant had committed four crimes instead of seven as assumed by the trial court—for petitioner here had actually committed no crime before the crime at bar (if crime it was).

All of petitioner's prior convictions (see, *supra*, pp. 6-7) had been on the basis of classics. Under the decision

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[5] Mr. Justice Harlan noted, in *Roth*, the unconstitutionality of convictions for *Boccaccio*, *Ulysses*, and *Lady Chatterley's Lover*, 354 U. S. at 498, 506.

in petitioner's case here, the decisions holding them obscene patently violated freedom of the press, not merely because of any change in today's community standards, but because they are obviously not "utterly without redeeming social importance". *Roth* v. *United States*, 354 U. S. 476, 484; Model Penal Code, Tent. Draft No. 6, p. 39 (cited with approval in *Roth, supra*, at 487, n. 20). Petitioner's New York convictions were under that State's obscenity law which then held that the tests rejected by this Court as unconstitutional in *Roth* (the *Hicklin* test)[6] and in *Butler* v. *Michigan*, 352 U. S. 380 (what is corruptive of youth)[7] were good state law. And as shown above, two of his convictions were on material previously cleared.

Petitioner has spent a total of almost four years in jail (and paid fines) as a result of these unconstitutional convictions. He is now sentenced to five years solely because of these unconstitutional convictions—which should have been used in amelioration, not in aggravation of, punishment. Furthermore, there is a question of whether his past acquittals should not count in his favor in view of the substantial deprivations of liberty and property that an unjust criminal prosecution inevitably entails.

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[6] *People* v. *Muller*, 96 N. Y. 408—good law at the time of petitioner's New York convictions (1928, 1934), approved in *People* v. *Wendling*, 258 N. Y. 451, 453 (1932).

[7] *People* v. *Wendling, supra*, n. 6; see also *People* v. *Berg*, 241 App. Div. 543 (2d Dept.), *affd.*, 269 N. Y. 514; *People* v. *Smith*, 252 App. Div. 622 (1st Dept.); *People* v. *Pesky*, 230 App. Div. 200, *affd.*, 254 N. Y. 373; *People* v. *Finkelstein*, 114 N. Y. S. 2d 810, 813 (not officially reported); *People* v. *London*, 63 N. Y. S. 2d 227, 230 (not officially reported).

POINT II

The Court of Appeals in affirming the refusal to modify a maximum sentence, tremendously at variance with the usual sentence, imposed for a minimal offense solely because of a record of obscenity convictions in the remote past, has decided an important question of federal law which has not been, but should be, settled by this Court, and so far sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Even assuming, solely by way of argument, that all the prior convictions were valid, a substantial and important federal question is presented—for several reasons.

Whether there can be imposed, consistent with federal due process and with law, a maximum sentence [8] for what is concededly a minimal offense (see pp. 8-9, *supra*) presents a question which of itself is worthy of review, even though

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[8] The district judge labored under the illusion that he could have imposed the maximum sentences upon each of the four counts upon which defendant was convicted (App. 31a). (The Court of Appeals avoided this question, even though there should have been a resentencing if the district judge was wrong. He was.) The defendant was convicted of mailing or causing to be mailed (paradoxically, there is not a word in the trial record to show any knowledge on his part of the contents of the mailing) one book (count 24) and three circulars (the remaining counts). (Since there is no material difference whatsoever between the circulars upon which defendant was acquitted and those upon which he was convicted except that the latter involved advertisements for the book in count 24, it is manifest that the circulars themselves were not found obscene but that the jury found that they advertised obscene material.) Obviously, the sending of the circulars was but a part of the sale and delivery of the book involved in count 24, so that this case would seem to fall within the doctrine that a completed offense necessarily includes the incompleted offense, the lesser three offenses being merged into the greater [*United States* v. *Donovan*, 242 F. 2d 61 (C. A. 2, 1957); *United States* v. *Tarricone*, 242 F. 2d 555 (C. A. 2, 1957)]. This case also falls within the doctrine of *United States* v. *Chiarella*, 184 F. 2d 903,

the sentence be within allowable statutory limits.[9] But several factors are added here:

A. The sentence was far beyond the accepted and usual sentence.[10] There is great public interest in the problem

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187 F. 2d 12 (C. A. 2, 1950, 1951), to the effect that the receipt, possession, and sale of certain material was all one offense.

While the obscenity statute itself furnishes no guide to whether the mailing of advertisements for obscene material is the same offense as the distribution of such material, the ambiguity requires that the harsher alternative not be chosen since Congress has not spoken clearly and definitely. *Bell* v. *United States*, 349 U. S. 81; *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218, 221-2; *Prince* v. *United States*, 352 U. S. 322.

[9] While not disputing the contention of the Court of Appeals that a sentence within such limits cannot as a general rule be reviewed on direct appeal, the question of the scope of review on a motion to reduce sentence presents an important question which has not but should be reviewed by this Court. Since decisions on motions for reduction of sentence under the federal probation statute are reviewable for abuse of discretion under a Fourth Circuit ruling [*Mann* v. *United States*, 218 F. 2d 936 (C. A. 4, 1955)], the decision below—not reviewing for abuse of discretion—would seem to be in conflict with that of another Court of Appeals on the same matter. There must be some remedy for abuse of a sentencing judge's "broad discretionary power", a power so "susceptible of abuse." *Williams* v. *New York*, 337 U. S. 241, 251.

[10] In recent years, no sentence even remotely resembling that imposed had ever been imposed; according to the only information available to the sentencing judge at the time of the motion, the severest sentence imposed at that time being a fine, usually light (App. 15a, 21a, 27a-28a). See, also, the testimony of the Post Office Inspector in charge of investigation of criminal obscenity cases for the Post Office at Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, U. S. Sen. 84th Cong. 1st Sess., pursuant to Senate Resolution 62, pp. 283-4:

> "My experience has been that the penalty is very small in most obscenity cases; they get $50 or $100 fine. Most of them are probation and frequently there is not even a fine. The most excessive fine—* * * these defendants were given suspended jail sentences from 6 to 9 years and fines were $1,500—I got a $3,000 fine, 1 a $4,000 fine, and 1 a $5,000 fine, which is quite excessive * * *" (p. 293).

of disparity of sentences.[11] It is most important; justice suffers when the public knows that justice is unequal. Whether this is illegal, and whether it is violative of equal protection of the laws and hence prohibited by federal due process, presents a question which should be settled by this Court if the public is not to lack confidence in the federal judicial system.

B. Past convictions may of course normally be considered in imposing sentence [*Olson* v. *United States*, 234 F. 2d 956 (C. A. 4, 1956)], but they are traditionally considered only as bearing upon present moral character. Whether they can be considered as a factor *per se* increasing punishment presents questions of 1) whether this is consistent with legislative intent, when Congress knows how to provide for increased punishment for recidivists when it wants to; 2) whether this is consistent with the double jeopardy prohibition of the Fifth Amendment to the United States Constitution—the English high Court

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[11] Former Solicitor General Sobeloff recently pointed out the many public figures and organizations interested in this problem. Calling for some procedure to bring sentences within a measure of consistency, he noted that the several state courts which regularly permit appeals as to sentence (irrespective of disparity) report that it works. Sobeloff reports that under broad scope of review of sentence, neither these state courts nor Great Britain have been at all inundated by appeals re sentence (less than 5% of sentences appealed in Britain). Sobeloff, Recommendation for Appellate Review of Criminal Sentences (1954), 21 Brooklyn L. Rev. 2; see, also, Campbell, Developing Systematic Sentencing Procedures (1954), 18 Fed. Prob. 3; Due Process and Legislative Standards in Sentencing (1952), 101 U. Pa. L. Rev. 257; Uniformity in Prosecutions and Punishment (1951), 115 Just. P. 483; Gaudet, Differences between Judges in the Granting of Sentences of Probation (1946), 19 Temp. L. Q. 471.

has indicated that it is not so consistent;[12] and 3) whether this represents such a substantial departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

Three further factors are involved, too: 4) the convictions had all been in the remote past—they were all at least two decades old. Since such events cannot be considered in assessing present moral character (*Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 243), a substantial question of whether such events can be considered, conclusively or otherwise in imposing punishment arises,[13] twenty years of good behavior[14] counting for nought. Ancillary to this is

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[12] "We think that it is not right to hold over a man's past offences which have been dealt with by appropriate sentences, as we must assume past offenses have been dealt with, and then up and increase accordingly the severity of the sentence for a later offence. *That is dangerously like punishing a man twice over for one offence.*" *Rex* v. *Betteridge*, [1942] 28 Cr. App. Rep. 171, 172. (Emphasis supplied.)

"It is entirely wrong to send a man to a long term of imprisonment or penal servitude merely because he has received heavy punishment at some other time for some other offense." *Rex* v. *Woodward*, [1929] 21 Cr. App. Rep. 137. (Six prior convictions; five year sentence reduced to nine months.)

[13] A sentence of six months for larceny because of a conviction for a "very serious offense" seventeen years previously, was reduced to two months in *Rex* v. *Bibbings*, [1918] 13 Cr. App. Rep. 205, the Court holding that "it is not a conviction which ought to weigh against him when he is convicted * * * seventeen years later." *Ibid.*

[14] It is true that petitioner had his troubles with the substantially unreviewable determinations of the Post Office. But he is more to be pitied than scorned, inasmuch as that pressure-conscious agency has ruled obscene works by Hemingway, O'Hara, James Jones, Moravia, Steinbeck, Mailer, Charles Jackson, Richard Wright, Somerset Maugham, Dumas, Voltaire, deMaupassant, Zola and Tolstoi. Its decisions in this realm have been universally ridiculed. deGrazia, Obscenity and the Mail, 20 Law & Contemporary Problems (1955) 608, 615. Some idea of the fantastic attitude of the Post Office can be found in the fact that it ruled obscene the very maga-

the question of whether the maximum sentence can be upheld because of past convictions after the present offense has been admitted to be of the least serious sort by the United States—a question answered in the negative by the English courts.[15]

5. The Court proceeded to sentence upon the assumption that "in view of that record, you (Roth) had plenty of admonitory signs" (App. 8a). This assumption was patently invalid and irrational when there had been no convictions for twenty years, combined with an acquittal four years previously in that court. This presents the question of whether an irrational assumption in sentencing violates federal due process, when such irrationality has been held by this Court to vitiate state administrative proceedings. *Konigsberg* v. *State Bar of Cal.*, 353 U. S. 252.

Surely the questions presented here, so often reviewed by Great Britain's high Court, are worthy of review by this Court.

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zines cleared by the jury in *Roth*, on the ground that it was not a party to the court trial. *In the Matter of Samuel Roth*, P. O., H. E. Docket No. 4/74 (1957) (a case carried to final departmental decision by Mr. Roth as a matter of principle, though he was no longer in business). In an unrelated case, decided after this Court's decision in *Roth*, the Final Departmental Decision (12/4/57) affirmed the hearing examiner's finding that a story "patently oversteps contemporary community standards. The theme of prostitution, the presentation of prostitutes in a not unfavorable light * * * certainly are not condoned in this day and age." *In the Matter of Excellent Publications, Inc.*, P. O., H. E. Docket No. 5/112, p. 9 (Hearing Officer's Report and Recommendations).

[15] *Rex* v. *Taylor*, [1924] 18 Cr. App. Rep. 143 (35 year-old defendant, twenty prior convictions; three year sentence reduced to twelve months; *Rex* v. *Jones*, [1931] 23 Cr. App. 69 ("shocking record"; five year sentence for stealing reduced to 18 months, "Having regard to the magnitude of the offense itself"); *Rex* v. *Baker*, [1915] 11 Cr. App. Rep. 175, 176 (many prior convictions, including at least three for same offense; five year sentence reduced to six months—for "whatever may be the appellant's character, regard must be had to the nature of the offense. He must not be sentenced to penal servitude merely because he has been so sentenced before.")

6. Finally, we suggest that even if the practices of which we complain could be upheld in the average criminal case, an exception must be made for the non-hard-core obscenity field. The worst that can be said of a record such as that of petitioner's is that judicial precedents did not keep pace with his crusade for freedom of the press. To punish him for these past convictions would violate freedom of the press, since the "very basis of a free society" is "the right of expression beyond the conventions of the day" (Frankfurter, J., concurring in *Hannegan* v. *Esquire*, 327 U. S. 146, 160). Moreover, where hard-core obscenity is not involved, deciding what is obscene and what is not obscene is largely a subjective judgment;[16] this Court in *Roth* recognized that different juries may legitimately reach different conclusions on the same material in this imprecise field (354 U. S. at 491, 492, fn. 30). This Court has recently unanimously reversed many findings of obscenity, some of such findings having been made *after* this Court's clarifying decision in *Roth*. The English courts have held that a prisoner is entitled to a light penalty where a statute is not yet thoroughly understood, or is defined in general terms, leaving "room for a margin of error". *Rex* v. *Skwarchuk* (No. 2), [1943] 1 D. L. R. 361, 369. Another question which should be decided by this Court, but which has not previously come before it, is whether the borderline between a free press and obscenity is so diaphanous and evanescent that an accused should be entitled not to have past convictions against him for obscenity result in the maximum sentence.

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[16] Cf. testimony of the former Post Office Solicitor, who publicly admitted that when five of his assistant censors attempt to determine what is obscene, "you will get five different results. * * *; * * * *It is just an honest difference of opinion.* We experience it all the time." (Report of the Select Committee on Current Pornographic Materials, House of Representatives, 82nd Cong., pp. 94-95, emphasis supplied.)

POINT III

In approving the District Judge's failure to take into account all the facts and circumstances as they existed on the return day of the motion, the court below decided an important question of federal law which has not been, but should be, settled by this Court, and so far sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

While this Court has ruled that a sentencing court must consider the possibility of the offender's repeating his offense, his character, life, family and background, and the nature of the offense itself [*Williams* v. *New York*, 337 U. S. 241], [17] it has not decided whether such matters must be taken into account in a Rule 35 motion to modify sentence. Just what may be considered on such a motion is a matter of frequent litigation, presenting a question which should be resolved by this Court in the light of its importance and the fact that so many Rule 35 applications are made.

The lower courts have held that on a Rule 35 motion, the court must act "in the light of the surrounding circumstances and the dangers incident to society at the time" of the motion. *United States* v. *Minoru Yasui*, 51 F. Supp.

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[17] *Williams* recited these considerations (and others) in resolving the question there presented of "the rules of evidence applicable to the manner in which a judge may obtain information" for use in sentencing; the widest possible latitude was given by this Court because of the need to get the widest possible information. The case at bar concerns the non-use of such information in a judicial system where the theory of penology requires even a deprivation of the right to cross-examine the sources of such information. If such information is so valuable as to require the forefeiture of such right, the failure to use such information becomes all the more a matter of concern for this Court—especially when unconstitutional methods and standards are used as a substitute. See *id.* at 252, fn. 18.

234, 235 (D. Ore. 1943). It "is constrained to examine the conduct of defendant subsequent to the date sentence was imposed * * *." *United States* v. *Hallinan*, 103 F. Supp. 800, 801 (N. D. Cal. S. D., 1952). It must consider defendant's attitude at the time [*United States* v. *Sobell*, 109 F. Supp. 381, 382 (S. D. N. Y. 1953), *aff'd* sub. nom. *Rosenberg* v. *United States*, *supra*], and new information brought before it. *United States* v. *Scott*, 124 F. Supp. 335 (S. D. Cal. S. D. 1954).

Thus, the lower courts have reduced the sentence of a person who violated curfew regulations, whose conviction had been affirmed by the Supreme Court, because—although World War II was still on—"indicia of invasion" had "disappeared", all Japanese had been removed from strategic areas, and the defendant would be kept "under close surveillance" if he remained. *United States* v. *Minoru Yasui*, *supra*. And sentences for violation of the Selective Service Act have been reduced to time served when defendants thereafter complied with all laws as rquired by the court and then entered the armed forces. *E.g.*, *United States* v. *Weinberg*, 57 F. Supp. 237 (S. D. N. Y. 1944).

The sentencing judge below ignored many factors presented for the first time at the Rule 35 hearing, each of which has been held decisive by other courts. Thus, the dangers to society from a prisoner at the time of the motion must be considered [*United States* v. *Minoru Yasui*, *supra*]—but the judge ignored that petitioner was concededly out of business altogether, and guaranteed never to resume the mail order or publishing business (App. 15a). The judge failed to consider petitioner's age and changed precarious physical condition—though such was decisive with another judge of the same court [*United States* v. *Ribler*, 148 F. Supp. 583]. Though *Ribler* considered the possibility of defendant's innocence, the judge here failed to take into account that not merely had the United States Attorney conceded on the trial that only part of the offending book (a few pages out of several hundred) were obscene (App. 31a), but that the Solicitor Gen-

eral had conceded that petitioner's material was at worst borderline (App. 12a) and that the Justice of the Supreme Court for its Circuit had ruled it not obscene, without disagreement from his associates, the judge failed to re-examine the materials in the light of the *Roth* definitions, making petitioner the only litigant in the country who did not have the benefit of this Court's decision in his own case, thus depriving him of the equal protection of the laws, violating federal due process. (Cf. *In re Summers*, 325 U. S. 561, 571.) The judge failed to consider the question of comparative sentences in comparative cases. (See *supra*, p. 17). He failed to consider petitioner's character, life, family and background. He failed to consider petitioner's cooperation with the court, which before other judges of the same court has resulted in amelioration of sentence [*United States* v. *Palermo*, unreported, per Dimock, J., *N. Y. Times*, February 4, 1958, p. 23, col. 2]: The sentencing judge failed to consider the nature of the offending material (cf. *Schware* v. *Board of Bar Examiners*, *supra*, 353 U. S. at 243), affirming the harshest sentence for the most minor offense.

All these departures from the normal and usual course of judicial proceedings—which should have been reversed as a gross abuse of discretion if nothing else—were sanctioned by the Court of Appeals. The case clearly calls for review by this Court.

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted by this Court, and the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

(Opinion and Judgment of the United States Court of Appeals for the Second Circuit.)

PER CURIAM:

The appellant's criminal conviction for sending obscene matter through the mails was affirmed by this court, 237 F. (2d) 796, and by the Supreme Court, 352 U. S. 964. Thereafter he made a motion in the district court for reduction of his five-year sentence to the time already served. Rule 35, F. R. Crim. P. This appeal is from the denial of that motion.

There is no question but that the sentence was within the allowable statutory limit. 18 U. S. C., 1461. It is the appellant's contention, however, that in imposing the sentence originally, and in refusing to reduce it, the district judge applied "illegal and unconstitutional standards." Specifically, it is asserted that the trial judge in determining the length of the sentence relied primarily upon the appellant's record of previous convictions for similar offenses, and that most, if not all, of these previous convictions would be invalid in the light of present standards. The record, however, shows that in addition to the appellant's prior criminal record, Judge Cashin had the benefit of a variety of other data, including a presentence investigation report, a "brochure" submitted by the appellant, and information as to the appellant's health and domestic life.

The rule is well settled that a United States Court of Appeals is without power to review or revise a sentence which is within permissible statutory limits. *United States* v. *Rosenberg*, 195 F. (2d) 583, 603-609, cert. den. 344 U. S. 838, rehearing denied 344 U. S. 889 (1952); *United States* v. *Landi*, 240 F. (2d) 238 (2 Cir., 1957); *Jolly* v. *United States*, 229 F. (2d) 180 (6 Cir.), cert. den. 351 U. S. 963 (1956). For the reasons stated this is not a case that demands inquiry as to what exceptions, if any, there may be to this

rule. See *Smith* v. *United States*, 223 F. (2d) 750, 754 (5 Cir., 1955). Nor need we here inquire as to the extent of the Supreme Court's jurisdiction in this area in the exercise of its supervisory power over the administration of justice in the lower federal courts. Compare *Yates* v. *United States*, —— U. S. ——, 26 U. S. L. Week 4277 (May 5, 1958), with Mr. Justice Frankfurter's memorandum in *Rosenberg* v. *United States*, 344 U. S. 889, 890 (1952).

Affirmed.

APPENDIX B

(Oral Opinion of Cashin, *J.* on Original Sentencing.)

The Court: One of the unpleasant duties of a judge is imposing sentence.

However, in this case, according to the probation report, which I have before me, and also the brochure, if you want to call it that, which you mailed me, and which I read, as I said, twice, it appears that over a period of years you have been engaged in the type of work for which this jury found you guilty.

My recollection is that there were four or five previous convictions of similar kind, they being divided between the federal courts and the state courts.

And your counsel talks about premonitory signs. It seems to me, in view of that record, you had plenty of admonitory signs.

I feel that you had a fair trial. The jury has rendered its verdict and found you guilty on four of the counts which were submitted to them.

The sentence of the Court, on count 10 of the indictment, is that you be imprisoned for a period of five years and that you, in addition, pay a fine of $5,000, and that you be committed until that fine is paid.

On count 13 of the indictment, the sentence of the Court is that you be imprisoned for a period of five years and fined the sum of one dollar, which fine is remitted.

On count 17 of the indictment the sentence of the Court is that you be imprisoned for a period of five years and fined one dollar, which fine on that count is remitted.

The sentence of the Court on count 24 is that you be imprisoned for a period of five years and pay a fine of one dollar, which fine on that count is remitted.

The terms of the imprisonment on counts 13, 17 and 24 are to run concurrently with the sentence imposed upon count 10.

At this time I remand the defendant.

APPENDIX C

(Oral Opinion of Cashin, *J.* Upon Denial of Rule 35 Motion.)

The Court: I feel that this man had a fair trial in front of me. He was given every opportunity by this Court during that trial to present his version, his side of the case. In fact, our Circuit Court of Appeals, in its opinion, said that he had a most unusual trial because I permitted the man a great latitude, rightly so, in my own estimation, in production of proof.

The matter was appealed to the Circuit Court of Appeals and was unanimously affirmed in the Circuit Court of Appeals. Certiorari was granted. It went to the Supreme Court of the United States and by a 6-3 court they affirmed the conviction.

I feel that my sentence, in view of this man's record at the time I imposed it, was fair and just.

I could have imposed a greater sentence but—he was convicted on four counts—I didn't. I only imposed the same sentence on the four counts, but I had the last three counts run concurrently with the first count that I imposed the five-year sentence on.

I cannot conscientiously reduce the sentence; and I don't intend to. So, accordingly, your motion for reduction of sentence is denied.

Those letters that you have, I would recommend you file them with the Court so they become part of your motion. I will be glad to look at them but I assume they are just the ordinary letters that the Court gets about the man's—

Mr. Albrecht [Counsel for Defendant]: Would your Honor hold the motion in abeyance until you have read these?

The Court: No. You may file them. I have already ruled.

All right, motion denied.

APPENDIX D

(18 U.S.C. 1461)

62 Stat. 768, 18 U. S. C. § 1461 (derived from R. S. § 3893, and originally passed as § 148 of an Act of June 8, 1872, 17 Stat. 302). *Mailing obscene or crime-inciting matter.* This statute, upon which the indictment was based, before its amendment, on June 28th, 1955, provided, insofar as pertinent, as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, papers, letter, writing, print, or other publication of an indecent character; and
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *
>
> "Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance, * * *
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> "The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

Note: The Court in its charge to the jury (Record page 579) applied this language as the law applicable to the crimes charged in the Indictment.

JUN 2 3 1958
JOHN T. FEY, Clerk

No. [redacted]119

United States Court of Appeals

For the Second Circuit

SAMUEL ROTH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF

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United States Court of Appeals

For the Second Circuit

SAMUEL ROTH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Statement Under Rule 15(b)

The proceeding below was a motion for reduction of sentence, pursuant to Rule 35 of the Rules of Criminal Procedure, brought on by a notice of motion filed the 29th day of October, 1957. The matter was referred to the Honorable John M. Cashin, Judge of the Court below, who held a hearing thereon on November 27, 1957. The motion was denied off the bench and no written opinion was delivered, nor were any findings of fact or conclusions of law made, though the Court's reasons were orally stated. A notice of appeal was timely filed in the Court below on December 6, 1957.

Order Appealed From

[823] Motion denied. November 27, 1957.

s/ JOHN M. CASHIN,
U. S. D. J.

Minutes of Original Sentence

[881] Mr. Leisure: If your Honor please, before [882] the Court this morning for sentence is Mr. Samuel Roth, who was convicted after a two-weeks' trial before this Court and jury on February 13, 1956.

The Court: Are you ready now? Mr. Roth had better stand up here.

Mr. Leisure: The defendant was convicted on four counts of mailing obscene material in the United States mails, specifically, Title 18, Section 1461. The counts he was convicted of were Counts 10, 13, 17 and 24 of Indictment C-148-9.

Mr. Roth has been in the business of distributing this type of material for close to 40 years.

I am informed by the Post Office that he is considered to be one of the largest distributors of this type of material in the United States and that he is one of their most persistent offenders.

I know that the Court has presided at this trial and also that the Court has a pre-sentence report available. For that reason I don't intend to make a long statement at this time. However, I think I should properly bring to the attention of the Court the fact that, first of all, [883] even after the indictment in this case was filed July 20, 1955, Mr. Roth's activity, if anything, seemed to increase, and I am informed by the Post Office that we received in excess of 1,650 written complaints after the indictment was filed.

I also have a circular which was mailed on December 31, 1955, which is some three days before the trial commenced. I am not entirely clear what the defendant may think that the acquittal on certain counts means, whether it means it opened the door to continue to mail the material of which he was not convicted, and I am not prepared to

say. However, yesterday I received from the Post Office a package of Good Times magazines which had been sent unsolicited, and the recipient had complained and sent them to the Post Office, and they were postmarked January 18th, even after the conviction in the case.

Because your Honor has the pre-sentence report, I believe he is aware of the prior record, Mr. Roth's prior record, both state and federal. The prior federal record was in 1936, at which time he was sentenced to three years.

The Court: Mr. Atlas?

[884] Mr. Atlas: Yes, sir.

Your Honor, in the course of a trial of this kind, in a field to which I have paid considerable attention in my day, and I hope to pay some other attention to, it is very difficult, as I have sometimes forgotten, and I trust I will not, to remember that the one I am representing is a human being. It is easy to forget that because we can go up into an ivory hall and discuss this too. There is a great deal of culture involved in the study of literature, but I would like to discuss this defendant for a few minutes as a person.

Mr. Leisure said he was a previous offender. I say that that is language which can be used easily about a man who previously committed a burglary because burglary is a definable thing, so that if he committed a burglary once, it reveals an animus, if you will, in time, and it reveals the jimmying instincts of opening a door and entering a closed place; if he did it again and again, we would say, in the language of the penal law, that he was a recidivist, but here we have a previous offender, so-called, whose offenses of yesterday are no longer offenses. Here is a man that went to jail for [885] selling Ulysses. Does anybody know that? The Post Office will say he is a persistent offender. He went to jail for selling Boccaccio, a book that you can pick up in any library. I think it was Boccaccio. Ulysses can be bought anywhere. As a matter of fact, I think, your Honor, shocking as that may seem, my name is in every copy of Ulysses gotten out by the Modern Library because of the decision of Judge Wolsey in that case. The book

goes out with the stamp of approval of a great predecessor of yours on this bench. For that he went to jail in Philadelphia.

I know, your Honor, that he has given an autobiographical sketch of himself, in which I instructed him to withhold nothing.

How can you call him a previous offender? It is hard to say. If you say that he has been a persistent publisher, that is true, but he has also persistently published—and the things that were condemned, by the way, are in every instance classics

When he was convicted here in 1936, your present colleague, Judge Kaufman, prosecuted that case. What were the books? I can't remember [886] them all. The records no longer reveal them, but I have been able to elicit this, the Perfumed Garden, an Arabic classic, Lady Chatterly's Lover, an English classic, and I can't remember the other, but those books are no longer suppressed. Those things are no longer crimes, not by our standards, not by this standard which is in constant flux, as Dr. Lewis put it, as Dr. Roche put it, as anybody put it. We don't need an expert to tell us that. Those were his offenses of yesterday.

Here he is in a trial in which we were trying to sound for a definition of what your Honor knows and I know has been called a bewildering law. If the law is bewildering, the question of sentence has to be bewildering.

The crime that was chosen, the mailing of Aphrodite, occurred five years ago, it was in 1950; he wasn't indicted in this court until 1954 in an indictment which charged only that one book.

Then, of course, the Government felt—well, whatever it felt, it got a superseder of 22 counts more, or, at least, the whole thing was 26 counts, and then the case was tried. Four years went by before this volume of American [887] Aphrodite No. 3 was charged as being obscene. In

that interval other volumes of American Aphrodite were being contested by the Post Office in proceedings. Nobody ever contested American Aphrodite No. 3, not the Post Office even.

Four years later the man is indicted for a crime.

A lot of things are involved in this indictment. I know how in a democracy we sometimes do things by spurts. I have already alluded to the fact that one morning the defendant woke up to find—one day—to find he had no business. There was a writ on his premises, 70,000 volumes were taken away, his machinery and his lists and everything else were carried out by the County of New York. Within 24 hours, 48 hours; there was the news of this indictment, and at the same time came the subpoena of Mr. Hendrick's Committee.

I am not reading anything into that, nor am I reading anything into the fact that the personal animus of man makes man sometimes hurt himself. Because he has a personal animus he went to the extent of appearing on television with a magazine, demanding to know why he wasn't indicted.

[888] Your Honor, either the question of obscenity is a question which is based upon the mores of the day and which, therefore, may be different sometime in the future from what it is today, or it isn't. It is not a static crime as is proven in this defendant's own career. It wasn't static. It could happen to anybody.

Now, here is a man who is now 62 years old. Whether anybody likes him or not, that has a connotation. We all—we all—reach certain ages when the premonitory signals come to us in one way or another. It might be a twinge in the leg, it might be an illness, it might be a conviction like this. It might be standing vis-a-vis with your past, as he is at this moment, and with his future, as he is at this moment, but the premonitory signal is there.

I have had some conferences with him since he was convicted. It is my understanding, sir, that he wants to get out of this particular business. Number one, he wants to quit the mail order business entirely because even if what he is doing could be construed to be heroic, he is no longer the stuff that heroes are made of: a frail body, [889] diabetes and a kidney disorder. As a matter of fact, I understand that his diabetes is such that he is an object of amazement because he hasn't collapsed to his doctors.

He wants to get out of that; he has other plans. He has plans which are conformable for usefulness in a man of his years. He has merchandized razor blades. He wants to continue at that. He has merchandized very good writing which has no shades of sexual or erotic content. He is interested in the publication of certain religious classics. He wants to reorganize a school for instruction in English, which many years ago he ran with considerable success.

His wife hasn't grown any younger with him; she will be alone, if your Honor visits upon him the vengeance of a community because, I guess, that is all it could be. It couldn't be a deterrent. It could only be vengeance. It cannot even be an example because, as Mr. Leisure says, he is in a class by himself. It can only be vengeance.

He has children. If I may say so, very presentable, very beautiful, decent children and grandchildren.

[890] He has every reason, every reason, for giving up what has only been a continuous pain to him in his long years that have gone ahead of this point. This is the end for him, and my function here is to ask you, sir, by lodging also a plea for mercy, to go along with giving him an oppurtunity.

Nobody, your Honor—I mean this very sincerely; I have made my contribution to sending people to jail—nobody ought to go to jail today for what may turn out

tomorrow not even a crime. It has happened too frequently. I ask your Honor to spare him that.

I think, sir, if he were given an opportunity, by way of a suspended sentence and the probation of the Court, there is no question that he would do what I asked him to tell the Court that he wants to do. He would go into another field, another line; a publisher he will probably have to be because it is in his blood, but no mail order publishing, nothing of erotic content, and I use the word erotic because a great deal of what is called pornographic is only erotic; and I am asking for him some mercy from you.

Everything that I have said, your Honor, [891] about the trial, wherein there were objectionabilities in it, has to stand, but I must say this: the defendant has asked me to tell you this many times. He said that being tried by you, although he was at the wrong end here, that is, defendant, gave him a source of pride in being an American because there couldn't have been a more conscientious effort to make it a proper trial. That is so. I not only agree with him, but I join, your Honor, because that is the fact, but quite apart from the arguabilities in law which I have set forth, he is now asking you for mercy. He is asking you as a man to give him a chance as a man.

I know he has written to you.

When I came in this morning he asked me whether I would request leave for him to address you. Now I do so, your Honor.

The Court: No, I am not going to grant that.

Mr. Atlas: All right, sir.

The Court: I see no need for it. I received from the defendant a long memorandum which I read, not once but twice. So that there would be no need for that.

Mr. Atlas: All right. Well, I can only [892] say, sir, that you might say his fate is in your hands and I beg you

for his sake to give him an opportunity to rehabilitate what has gone awry with his life.

[893] The Court: One of the unpleasant duties of a judge is imposing sentence.

However, in this case, according to the probation report, which I have before me, and also the brochure, if you want to call it that, which you mailed me, and which I read, as I said, twice, it appears that over a period of years you have been engaged in the type of work for which this jury found you guilty.

My recollection is that there were four or five previous convictions of similar kind, they being divided between the federal courts and the state courts.

And your counsel talks about premonitory signs. It seems to me, in view of that record, you had plenty of admonitory signs.

I feel that you had a fair trial. The jury has rendered its verdict and found you guilty on four of the counts which were submitted to them.

The sentence of the Court, on count 10 of the indictment, is that you be imprisoned for a period of five years and that you, in addition, pay a fine of $5,000, and that you be committed until that fine is [894] paid.

On count 13 of the indictment, the sentence of the Court is that you be imprisoned for a period of five years and fined the sum of one dollar, which fine is remitted.

On count 17 of the indictment the sentence of the Court is that you be imprisoned for a period of five years and fined one dollar, which fine on that count is remitted.

The sentence of the Court on count 24 is that you be imprisoned for a period of five years and pay a fine of one dollar, which fine on that count is remitted.

The terms of the imprisonment on counts 13, 17 and 24 are to run concurrently with the sentence imposed upon count 10.

At this time I remand the defendant.

Mr. Atlas: May I be heard a second, sir?

The Court: Yes.

Mr. Atlas: Your Honor, will you please consider this, an application for bail pending appeal?

The Court: Yes, but I am not going—there is no need of wasting any time on it, Mr. Atlas. It has been my practice since I have been on the bench [895] not to consider appeals in any cases that have been before me.

* * *

Motion for Reduction of Sentence

[813] Now comes the defendant, Samuel Roth, by his attorneys, David von G. Albrecht, O. John Rogge, and David P. Siegel, and respectfully moves the Court under Rule 35 of the Federal Rules of Criminal Procedure to grant him a reduction of sentence to time served for the following reasons:

1. The defendant's case involves fundamental questions of federal constitutional law under the First, Fifth, Ninth and Tenth Amendments which went all the way to the United States Supreme Court. *Roth* v. *United States*, 354 U. S. 476 (1957). The Supreme Court divided 6 to 3 in a 27-page decision. The dissenters were Mr. Justice Harlan, Mr. Justice Douglas, and Mr. Justice Black. Mr. Justice Harlan in his dissent wrote:

> "The point is that this statute, as here construed, defines obscenity [814] so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as "hard-core" pornography. Nor do I think the statute can fairly be read

as directed only at *persons* who are engaged in the business of catering to the prurient minded, even though their wares fall short of hard-core pornography. Such a statute would raise constitutional questions of a different order. *That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse this case with instructions to dismiss the indictment.*

* * *

Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in forty-eight States, forty-eight experimental social laboratories. State statutory law reflects predominantly this [815] capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation. Different States will have different attitudes towards the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people

of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are [816] truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both of the letter and spirit of the First Amendment.

I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship, and in view of the fact that the constitutionality of this conviction must be weighed against the First and not the Fourteenth Amendment * * *."
354 U. S. at 505-507.

Said Mr. Justice Douglas:

"The standard of what offends "the common conscience of the community" conflicts, in my judgment, with the command of the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of [817] the press." Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were in

volved. How does it become a constitutional standard when literature treating with sex is concerned? * * * For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless.

I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field."

2. The defendant did not deal in pornography. The government in its brief in the Supreme Court in effect admitted this. The government in its brief distinguished between pornography and "border-line" material. It admitted that defendant's material was of the border-line type. In its brief the government stated:

"Another kind of publication in the borderline entertainment area is the sort with which petitioner in this case has been associated over the years (Pet. Br. 5-6). These are publications of individual [818] works, or more usually selections or chapters from various writers, which have an erotic interest but may or may not be pornographic. Typically this may contain a collection including a work which, because of its age, might be called a 'classic', some poetry, some pseudoscientific discussion of sex habits, etc. Sometimes, such a book or magazine is so concentrated or explicit discussion of sex that, taken as a whole, it is found to be obscene. * * *". At Br. 36.

3. In the argument of the application for bail it was admitted that the defendant was primarily a poet and author. It was later demonstrated concerning the defendant that:

> * * * Those cases in which he was convicted involved the sale of *Ulysses* by James Joyce, a book which was subsequently held to be not obscene in *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (2d. Cir. 1934), affirming 5 F. Supp. 182 (D. S. D. N. Y. 1933); the English version of Arthur Schnitzler's *Reigen*, a movie from which under the title *La Ronde*, was permitted circulation by this Court in *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954); Sir Richard Burton's translation of *The Perfumed Garden*, a classic fourteenth century Arabic work; *American Anecdotes*, a volume which is now available [819] to the public; a translation of *The Anâga Ranga*, a famous Hindu classic dealing with the art of love in the style of the Latin *Ovid*; and two stories by Boccaccio that can now be obtained at the New York Public Library and purchased in any book store. His other engagements with the law, in which he obtained dismissals, involved the publication of Benjamin Franklin's essay entitled *To a Young Man on How to Choose a Mistress*; Celestine, which is the English version of *The Diary of a Chambermaid* by Octave Mirbeau, and which the New York Public Library now has available on its bookshelves with an introduction by Jules Romaine; and *Beautiful Sinners of New York*.
>
> Petitioner has written for such newspapers and magazines as the *Nation*, *Harper's Weekly*, *The Daily Mail*, *The Jewish Chronicle of London*, *The Boston Transcript* and *The New York Herald*. He is the author of several books, among them *Europe*,

published by Liveright; *Now and Forever*, published by Robert McBride Co.; and *A Study In Consciousness*, with an introduction by Sir Arthur Eddington, the great English philosopher and mathematician. Petitioner is also the editor of Voltaire's *Philosophical Dictionary*. He has long been an important figure in the defense of free press freedoms."

In 1957 the defendant, while free on bail, wrote *Apotheosis* which was published [820] in September 1957 and received favorable comments, and finished *The Life of Jesus Christ* scheduled for publication in 1958.

4. The work which the government in its brief conceded might be called a "classic" is presumably *Ulysses* by James Joyce. The defendant spent three months in jail for this.

5. The defendant received the *maximum* sentence under 18 U. S. C. Par. 1461 of five (5) years plus a fine up to Five Thousand ($5,000.00) Dollars. By way of contrast, in most state court proceedings for the same offense the punishment is much less. For instance, in *Butler* v. *Michigan*, 352 U. S. 380 (1957), a state obscenity case at the 1956 Term of the Supreme Court the punishment was a fine of One Hundred ($100.00) Dollars.

The defendant received the maximum sentence. In the light of Mr. Justice Harlan's statement "* * * in my opinion the material here involved cannot be said to be hard-core pornography * * *"

and the Solicitor General's admission that the defendant's publication was "* * * in the borderline entertainment area * * *" and *not* "black market" or "hard core" pornography * * *" and accounts for less than 10% of the prosecutions under Par. 1461." and * * * "the petitioner is a publisher of borderline material" only.

it is respectfully urged that the severity and the length of sentence should be reevaluated by the sentencing tribunal.

Neither the statements of Mr. Justice Harlan, [821] Douglas and Black, nor the opinion of the Solicitor General bind the power of this Court. They are quoted here merely to awaken the conscience of the United States Attorney, if, indeed, he need such reminder!

6. The defendant has already served eight (8) months, lacking a few days, of the maximum sentence imposed upon him. This already exceeds the average of the sentences imposed in obscenity cases.

7. The defendant has abandoned his publishing venture and will undertake never again to enter this line of business.

8. The defendant's statistical mortality is less than the remainder of his sentence. The defendant's physical condition makes his sentence equivalent to a death sentence in prison.

The defendant is 63 years of age, a diabetic, suffers from heart disease and Osteoarthritis of both knees (Exhibit A).

He is married for over 40 years, has two married children and four grandchildren, who love and adore their grandfather. During his incarceration his wife had a breakdown and is now recovering. She lived alone in their apartment and kept it up for his return.

Motion for Reduction of Sentence

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

[822] SAMUEL ROTH, being duly sworn, deposes and says:

That he is the defendant in the within action; that he has read the foregoing motion and knows the contents thereof; that the same is true to his own knowledge, except the statement that the sentences imposed upon him exceeds the average of the sentences imposed in obscenity cases, and that as to this statement he believes it to be true.

s/ SAMUEL ROTH
Samuel Roth

Sworn to before me this day of
28th day of October, 1957.

SIDNEY SILVERMAN
Notary Public, State of New York
Qualified in Queens County No. 41-9004550
Term expires March 30, 1958

Motion for Reduction of Sentence

EXHIBIT A

DR. JACOB AUSLANDER
286 West 86th Street
New York 24, New York
TRafalgar 7-1006

October 25, 1957

[823] To Whom it May Concern:

This is to certify that Mr. Samuel Roth, 62 years old, is under my medical care since Jan. 28, 1957. His medical history includes diabetes mellitus for many years, right kidney stone 4½ years ago and an attack of "heart strain" (probably mild myocardial infarction) 2 years ago.

Examination reveals the following: Wt. 159 lbs., Urine: albumin 1 plus, glucose 4 plus (over 2%), blood pressure 160/90, marked peripheral arteriosclerosis. Heart: regular sinus rhythm, rate 72, accent of A2. Fluroscopy: elongated, tortuous, calcified aorta. Lungs: negative. Abdomen: negative. Tendon reflexes diminished. Osteoarthritis of both knees—(trauma to left knee—injury to left medial cartilage caused by twisting the knee while running. Injection of 1% Procain solution into left medial cartilage on 8/3/57). The blood sugar varied between 160 and 200 mgm.%. The patient was placed on Orinase 50 mgm. b.i.d. The last blood sugar (10/15/57) was 198 mgm.%.

Diagnosis: Diabetes mellitus.
Myocardial damage.
Osteoarthritis of both knees.

Mr. Samuel Roth is a semi-invalid. He is unable to do any heavy work requiring bending, stooping or kneeling. His diabetes requires constant care and supervision.

s/ JACOB AUSLANDER
Jacob Auslander, MD

Minutes of Hearing on Motion

[830] (Motion under Rule 35 for reduction of sentence.)

The Court: Both sides ready?

Mr. Albrecht: Yes, your Honor.

Mr. Kramer: The Government is ready.

The Court: Proceed.

Mr. Albrecht: May it please your Honor, as I stand here, your Honor, on this pre-Thanksgiving Day I recall a very recent Thanksgiving Eve not so long ago when I almost stood before a much higher Court, the Court of Last Resort. I had a heart attack on that day, and when a man has a heart attack, he stands for a brief moment in time on the brink of eternity. And for that space of time when his heart stops beating, considering whether or not to start up again, the panorama of his life is supposed to be before him, and a man is in a terrible position, and I believe, your Honor, that he is in a similar position to that of a judge who is in the lonely and difficult position of having to make a decision concerning a man's life and a man's living.

I regret that I have to bring this motion on today and add to your other burdens, but I would [831] feel remiss in my duty as an advocate, I would feel remiss in my conscience, if I did not bring this motion here today and rise in defense of Mr. Roth who has been termed in the Supreme Court of the United States an unconventional publisher, a man who publishes today what people reject only to accept tomorrow.

But I don't only rise in behalf of Samuel Roth, your Honor, I rise in behalf of his wife, I rise on behalf of his children, and I rise on behalf of his grandchildren, and in this poem that was published two months ago, written by Sam Roth, he dedicates it "To my grandchildren, Tina, James, Candice and Robert," and he says, "I did want to stay around a little longer."

Your Honor, as I understand it, imprisonment is visited upon a lawbreaker both as a punishment and as a deterrent.

This defendant was imprisoned for eight months before bail was granted to him.

He is practically, and this I say on the word of the Solicitor General and Assistant United States Attorney Mr. Leisure, out of business, and I say to you that as a condition of the parole which [832] I am asking for today that there is a guarantee that he is out of business, that he will never be in this business nor any other business except as a writer and as a poet. And I think that should answer our question as to whether this eight months has been a deterrent.

This defendant is 64 years of age. He is a cardiac. He is an arthritic. He is a diabetic. According to the table of statistical mortality, it is highly improbable that he will live through the remainder of his five years' sentence.

I have for your Honor's consideration two reports, from two doctors, indicating this, which I have already shown to the United States Attorney.

I submit, your Honor, that a five-year sentence in this case is really equivalent to a term of life imprisonment. When you give a penalty to a younger man, five years is not a great part of his life, but when you give it to a man 64 years of age, there is a terrible implication that that is the end, and that is a life imprisonment.

Your Honor, when I was going to law school, occasionally I chauffeured a Catholic Bishop, Bishop McClelland around when his car was broken down and he [833] didn't have any means of transportation up there at school, and every once in a while he would say, "What are you studying today?" Every time he would give me a point. One day he said, "Evidence;" and he said, "I'll tell you a story."

He said, "You know, there was a time when Moses, lying on his death bed, was berating God. He says, 'You

are always asking me to do things for you, and every time I ask you to let me do something, you don't let me. I should be able to go into the promised land.'

"God said, 'I always do something for you. I performed the greatest miracle of all ages. I took your people out of Egypt. I split the Red Sea, they went across the Red Sea dry. That was the greatest miracle of all times. I did that for you, Moses.'

"Moses said, 'How do you compare that to your miracle of creation? Why, your miracle of creation, you created the world, the earth, the sun, the heavens within six days. That was the greatest miracle of all times.'

"The Lord said, 'No, the greatest miracle of all times is the miracle which is done in the [834] presence of witnesses because, when I created the world, there was nobody around to see it, but when I took your people out of Egypt 400 days before I told them that I would, that was a great miracle.'"

And we talked; he said, "Always bring something as a witness," and what can I bring you as a witness today?

Well, I can only say we were up before the Supreme Court of the United States. That great Judge, Judge Harlan, gave us bail, and he said in his dissenting opinion that he would reverse this case with instructions to dismiss the indictment.

I read two sentences right from the record.

He says, "I do not think that the Federal statute can be constitutionally construed to reach other than what the Government has termed as 'hard-core pornography.'"

And he then continues, later on, to say, "That being so, and since in my opinion the material here involved cannot be said to be hard-core pornography, I would reverse this case with instructions to dismiss the indictment."

And the Solicitor General agreed with him [835] as to this fact, that it wasn't hard-core pornography, and what

the Solicitor-General did was to divide these cases into two classes for the Court, basically, pornography and what the Solicitor-General termed "borderline entertainment," and under "borderline entertainment" the Solicitor-General said, "That is the offense of Mr. Roth. Makes up only 10 per cent of the prosecutions that we have under those cases. It is the lowest kind. It is not in the high category that we are always going after." That is what Judge Harlan says. I call him as a witness here. He is the head of our Circuit.

He says, "It is the lowest category."

Then why give us the severest sentence?

Of course, that is a different time, your Honor. I didn't quarrel with the sentence at the time. This is at a different time.

I call as a witness Judge Douglas, with whom Judge Black agreed in the dissenting opinion.

So that we were 6 to 3 in the Supreme Court.

And I say that, in view of the fact that they termed it, and the Solicitor-General termed it, the minimum, we still received the maximum, five years, and $5,000 fine.

[836] By way of contrast, your Honor, at the time I argued this in the Supreme Court of the United States there were two other cases, one of them called the Alberts case and the other the (*sic*) Kennalsley case.

The sentence in the Alberts case: Judge Frankfurter in his opinion wrote, in the Alberts case, the defendant was fined $500 and sentenced to 60 days imprisonment and put on probation for two years on condition that he didn't violate the obscenity statute. He was contrasting that with the Kellalsley case in which there was no prison sentence at all.

I have tried, searched the records, your Honor, and I have failed to find a sentence as severe as this.

And when I was speaking to Judge Harlan about the case, I pointed out to him, and he agreed, in substance, that

the case upon which Roth was sentenced once before was a case known as Ulysses for which he spent three months in jail, and that book Ulysses is now required reading in most every college in the country.

Judge, it's a very dull book, it isn't [837] worth reading, and yet we have a man spending time in jail. Of course, I was facetious when I said to Judge Harlan, "Shouldn't we at least get that three months back?"

My associate, Mr. Rogge, will outline the various books and the various times that Roth was in conflict with the law. Most of these things are today acceptable. You can go into the Public Library and find them. You can find Benjamin Franklin's "To a young man on how to choose a mistress," in the Public Library of New York; you can find Mibeau's The diary of a chambermaid in the Public Library; you can find Boccaccio in the Public Library; you can find—there is, of course, that one case of Anaga Ranga, where he served the day; it's a book which sold $35 and, obviously never got into the hands of the youngsters, costing that price. It was wrong, we don't deny that, but the other things, the majority of times that he was in conflict with the law the American public buying books for 25 cents, those are times that we should at least realize that even if it was wrong at the time, perhaps there was some good can come out of it.

[838] During the period of his incarceration, your Honor, his wife had a nervous breakdown. She is sick today. She is 61 years old.

When a man has been married forty years, and I haven't been married that long, it is only 25, a wife doesn't need you for the general things that she needs in her youth, she needs somebody to hold on to. I ask for her.

During his incarceration, your Honor, he has been a model prisoner.

I have here for your Honor these letters, many of them from people in outstanding walks of life, editor of Forbes

Magazine, editor of the TV Guide. I ask your Honor's permission to give them to you. I showed them to Mr. Kramer. I would like your Honor, if your Honor will, to look at these letters.

In connection with them, I am an officer of the Court, and I would never urge your Honor to do a thing which I in my heart and my conscience wouldn't want your Honor to do, that is, I wouldn't want your Honor to urge me, if I was sitting on that bench today and doing the same things. For my urgings, I am ready to answer to my honor, my [839] conscience and my God, and I ask your Honor to reduce this sentence to the time already served, and I say that your Honor will never regret it because this man will live a useful life hereafter.

During the time that he was out of jail he wrote a book which was published, and there is another book coming out on the life of Jesus, scheduled for publication in 1958. He is no business man; should be away from these things.

And I have brought today with me Rabbi DeSola Pool. I have asked him to come here today because he is the dean of all American rabbis in this country today. For fifty years he was head of the Spanish-Portuguese Synagogue, which synagogue was established 300 years ago right down the way here, when the land upon which this Courthouse stands was just a cow path.

I have asked him to come here today to assist in helping the Court to come to a fair judgment. I know that it is a difficult thing, your Honor, and I am begging your Honor for mercy in this case.

Thank you, your Honor.

[840] Mr. Rogge: If the Court please, Mr. Albrecht has ably stated the argument which, I think, shows to your Honor that there should be a reduction of sentence to the time served. If I may, any other remarks I have I would like to make a reply to what the Government has to say.

The Court: Does the Rabbi want to be heard?

Rabbi Pool: Yes, your Honor.

The Court: I will hear you.

Rabbi Pool: Your Honor, reference has just been made to the fact that it was just fifty years ago that I became the Rabbi of a congregation which I have served since then. In all those fifty years I have never found myself in the position in which I find myself today. I have never felt that I could enter into a court to make a special appeal for an individual because of my complete ignorance of the details and requirements of a legal problem.

Today, for the first time in half a century, I have come down because I feel impelled by the human element involved to say just a word or so in this case that is brought to your Honor for your consider- [841] ation.

There is very little that I need say because Mr. Albrecht has given you the facts as I know them.

To me it seems fundamental that Mr. Roth will not go back into the business in any way. His future, therefore, if he is a free man, is one which we can all regard as being within the limits of the law in so far as his business is concerned.

What appeals to me so strongly is, as I said before, the human side. I know him, his wife and his family. I know his daughter well. She is a very fine citizen, doing excellent work in the public cause, the mother of children.

I cannot but feel that any sentence still to be laid upon Mr. Roth isn't laid upon him alone but upon his wife and his daughter, and his son, upon his grandchildren. They should be given freedom from this terrible blow.

[842] Reference has been made to his age and his health. I understand fully the problems of age and health, and I know that when a man has a heart that is not reliable, and is diabetic, and has other troubles, such a sentence as is laid upon him means a life sentence, and one cannot think that the law would in any way wish to be so interpreted

without equal recognition of such human elements as are involved which seem to appeal so strongly for that mercy which is part of the law.

Mr. Albrecht referred to the fact that today is the eve of Thanksgiving. In my congregation we have been holding Thanksgiving services since the time of George Washington and earlier. It would be a source of deep thanksgiving to me, to Mrs. Roth, to the family, and to others, if we could pour out our hearts before God tomorrow, knowing that mercy had overcon e the rigidity of the fixed law and had interpreted it in a w .y that meant giving, not a life sentence, but life to the defendant and to his wife.

Mr. Kramer: May it please your Honor, the Government has little to add to what was said [843] at the time that sentence was originally imposed by your Honor.

My remarks will be addressed, briefly, to statements made by Mr. Albrecht.

The prisoner Roth was convicted on four counts of a 25-count indictment after a full and fair trial, and after a charge to the jury by your Honor which was specifically approved as accurate and fair by the majority, six members, of the United States Supreme Court.

That material which the prisoner mailed, and which the jury found obscene under your Honor's charge, was specifically held to be obscene by the three judges of our Court of Appeals who considered the case on appeal and by six other judges of the United States Supreme Court. In other words, nine of the twelve assenting judges who reviewed the record in this case agreed with the finding of the jury that this was pornography, obscenity that had no social value whatever, and I would say that to attempt to portray the prisoner in this case as an imposed-upon author is without foundation in the face of the finding of the jury as approved by appellate courts which reviewed [844] the trial record in this case.

I believe that one of the factors that your Honor considered in imposing sentence in this case was the prisoner's prior record, which involved seven prior convictions for mailing pornographic, lewd and lascivious literature. Three of those convictions were federal convictions.

The last federal conviction, in 1936, resulted in a three-years—20-day prison sentence. Certainly this man had fair warning that the material he was distributing fell afoul of the law, yet he continued to engage in the very same activities. A sentence of three years was imposed on a prior conviction, your Honor.

I submit your Honor's sentence in this case was fair in view of the continuation of the very offense of which he was previously convicted.

There has been much said that the sentence in this case was the maximum sentence allowed by the law. I would point out that is not so. The maximum sentence, since the defendant was found guilty on four counts of the indictment, was 20 years, not five years.

The prisoner will be eligible for parole [845] at the end of the year, four months, under the federal statute. So it is not necessarily a commitment to jail for five years

I am not a doctor and I have no way of knowing what effect the commitment to prison will have on his health, but certain these factors were known to him at the time that he committed the acts which resulted in his conviction.

There has been reference made to the prisoner's family and how harshly the sentence will bear upon them, and the Government would only say, in response to that, that that is always the case when a man has been found guilty. It is not only himself who is involved but his family. If that were the reason for leniency and reduction of sentence, no criminal would ever be sentenced to jail.

Thank you, your Honor.

Mr. Rogge: If your Honor pleases, we are not at this point challenging the conviction. What we are seeking is

that the sentence itself be reduced, and we have additional facts and circumstances from the time when your Honor sentenced. I submit that some of those facts [846] and circumstances were called to your attention by my co-counsel, Mr. Albrecht, namely, that not only were there grave constitutional questions here which went all the way to the Supreme Court, but three judges agreed with our position, and I think the opinion that makes the most sense is that of Mr. Justice Harlan, and while I am not saying that is the majority opinion, it wasn't, but certainly you have both Mr. Justice Harlan and the Government in the Solicitor General's brief in the Supreme Court both pointing out that this man did not deal in hard core pornography. As a matter of fact, on that basis, Justice Harlan said, "I would reverse this case with instructions to dismiss the indictment." That is an additional circumstance. The Government's brief, drawing the distinction between pornography and borderline material, indicated that the defendant did not deal in pornography.

The Government just stated there could have been a sentence of 20 years here and, therefore, five years is not a harsh sentence, and that he is eligible for parole but, if the Court please, eligibility for parole and the granting of parole [847] are two different things.

The sentence which your Honor imposed is still the maximum that the statute provides, namely, five years and $5000.

My experience in the past few years, and I have tried more of cases involving charge of obscenity than anything else; I have tried them in four of the five boroughs here; I know that in the State cases, those that have come up for review, those, at least, from my—Mr. Albrecht called attention to the Alberts case; there was also the case of Butler v. Michigan, and what was the fine there? $100—in any of the cases in which I have been counsel, and in four of the boroughs, in Manhattan, Bronx, Queens and in Kings

County, where I have had cases in Special Sessions, the largest in cases of conviction, the largest sentence in any case where I have been counsel, and there have been about a dozen, the largest sentence that was imposed in any of them was a suspended sentence, no fine. By way of contrast here, this man got five years.

The Government in its argument today points to the fact that there were seven prior [848] convictions.

Well, if the Court please, one of those convictions involved the sale of Ulysses, which was specifically held by the Second Circuit here in United States v. One book entitled Ulysses, 72 Fed. 2d 705, to be not obscene. He got three years. He served three years—three months in that case.

Rather than pointing to that fact as the basis for a severe sentence here, I point to it as a circumstance supporting my request that the sentence be reduced to time served. He served three months for a publication that in that case was held to be obscene and was later determined to be not obscene. Rather than militating against him, it should operate in his favor.

Another one involved the English version of Arthur Schnitzler's Reigen, a movie from which under the title La Ronde, was permitted circulation by the United States Supreme Court in Commercial Pictures Corporation v. The Board of Regents, 346 U. S. 587.

Another one was Sir Richard Burton's translation of The Perfumed Garden, a classic 14th Century Arabic work.

[849] Another was American Anecdotes, which is available to the public.

There were two stories by Boccaccio that can now be obtained from the New York Public Library and purchased in a bookstore.

I submit that convictions for material of that type, which either now circulate or, in two cases, once by this

Circuit, the book Ulysses, and in another case by the United States Supreme Court, namely, Arthur Schnitzler's Reigen, were held to be not obscene—to point to those now as the basis for this maximum sentence of five years, I submit, doesn't make sentence. On the contrary, I submit that these are circumstances that your Honor should take into consideration in reducing this extreme sentence of five years.

Mr. Albrecht has covered the other matters, but I do know that one of the things that a Parole Board takes into consideration is the man's family circumstance. Here you have a grandfather, a wife, children, grandchildren, and they love their grandfather. They think differently and they have a somewhat different view than the Government.

I submit, in view of the fact that this [850] man has already served, it is now over eight months—it was just under eight months before Mr. Justice Harlan granted bail; he has now been in custody again for some weeks. I was in a trial when this thing first arose, and then I was ill. I did want to be present when this argument was made. He has now served more than eight months.

If the Court please, while I haven't been able to make a check, it would be difficult to do, to see what sentences were actually imposed. I know of no appellate case involving a charge of obscenity, and I know of no case in which I have been engaged as counsel, where an individual charged with this offense served as much as eight months.

Let us look at the fact that he has already served over eight months. I submit that at this point, and in view of the additional circumstances which have occurred since your Honor sentenced this man, that it would accord with justice and be an act of mercy as well if your Honor at this time would reduce his sentence, reduce it, if your Honor pleases, to the time served and return the individual, who will be no further bother to society, to the bosom of his home and to his children.

[851] The Court: You argued the case in the United States Supreme Court, Mr. Albrecht?

Mr. Albrecht: Yes, sir, I did, and Mr. Rogge—

The Court: Any question of the excessiveness of sentence?

Mr. Albrecht: I have never raised that question.

The Court: I know it wasn't raised in our Circuit Court of Appeals.

Mr. Albrecht: I never raised the question, your Honor. I believed at that time, as I do today, that your Honor was the best judge of sentence in every case, and that is why I come today with the same plea. The plea is a plea for mercy.

Mr. Rogge: I want to add to that that my understanding of the law is that a question of severity of sentence is something the Supreme Court will not look into.

The Court: It wasn't raised in our Circuit Court of Appeals either. Never been raised until today.

Mr. Rogge: I might tell your Honor that the question of severity of sentence was one that did [852] occur to my mind. I didn't feel it was a question appropriate for the Supreme Court. As a matter of fact, in the petition for rehearing, which I filed in June, I expressly cited cases showing that the question of severity was not one that the Supreme Court would look at.

The Court: I feel that this man had a fair trial in front of me. He was given every opportunity by this Court during that trial to present his version, his side of the case. In fact, our Circuit Court of Appeals, in its opinion, said that he had a most unusual trial because I permitted the man a great latitude, rightly so, in my own estimation, in production of proof.

The matter was appealed to the Circuit Court of Appeals and was unanimously affirmed in the Circuit Court of Appeals. Certiorari was granted. It went to the

Supreme Court of the United States and by a 6-to-3 court they affirmed the conviction.

I feel that my sentence, in view of this man's record at the time I imposed it, was fair and just.

I could have imposed a greater sentence but—he was convicted on four counts—I didn't. [853] I only imposed the same sentence on the four counts, but I had the last three counts run concurrently with the first count that I imposed the five-year sentence on.

I cannot conscientiously reduce the sentence; and I don't intend to. So, accordingly, your motion for reduction of sentence is denied.

Those letters that you have, I would recommend you file them with the Court so they become part of your motion. I will be glad to look at them but I assume they are just the ordinary letters that the Court gets about the man's—

Mr. Albrecht: Would your Honor hold the motion in abeyance until you have read these?

The Court: No. You may file them. I have already ruled.

All right, motion denied.

Extract From Trial Minutes

Mr. Leisure: * * * There is one exhibit number 10 in evidence, which consists of American Aphrodite Volume I, number 3. The book is in evidence. The Government contends that only certain parts of this book are obscene. * * *